MEMORANDUM

To: **Corbin Davis, Clerk**
Michigan Supreme Court

From: **John J. Ronayne, III , Counsel for the Michigan Association of Broadcasters and Post-Newsweek Stations, Michigan, Inc., d/b/a WDIV**

Re: **ADM File No. 2011-09 - Proposed Amendment to Administrative Order 1989-1**

Date: **October 1, 2012**

Dear Mr. Davis,

The Michigan Association of Broadcasters ("MAB") is a Michigan non-profit corporation representing approximately 400 broadcast organizations in the State of Michigan. Post-Newsweek Stations, Michigan, Inc. is the owner, operator and licensee of television station WDIV in Detroit ("WDIV").

The MAB and WDIV appreciate the opportunity to submit their comments.

I. Under what circumstances should the presumption in favor of "film or electronic media coverage" be overcome?

As originally promulgated, Administrative Order ("AO") 1989-1 created a presumption in favor of "film or electronic media coverage": "Film or electronic media coverage shall be allowed upon request..." (AO 1989-1, §2(a). The proposed amendment retains that presumption for the trial courts and repeats precisely the same presumption with specific reference to the appellate courts.

In its original form, AO 1989-1 provided that the presumption could be overcome upon a finding "in the exercise of discretion, that the fair administration of justice requires such action." In the proposed amended form of AO 1989-1, this test will continue to apply in trial courts.

In the proposed new section 2(b) which specifically applies to the appellate courts, the presumption can be overcome upon a showing of "good cause as determined under 8.116(D)."[1]

The reason for having one standard in the trial courts and another in the appellate courts is not clear. The "fair administration of justice" standard applicable in trial courts is not particularly instructive or helpful. The "good cause/MCR 8.116(D)" standard embodies the *Press-Enterprise v. Superior Court*, 464 U.S. 501 (1984) First Amendment standard for denying the public access to court proceedings. While certainly an improvement over the "fair administration" standard, the "good cause/MCR 8.116(a)" is not well-focused on the narrower issue at hand. MAB and WDIV suggest a standard which is different than either "good cause" or "fair administration," which would apply in all courts, and would permit a denial of "film or electronic media coverage if:

> "... the film or electronic media coverage will have a prejudicial effect which is otherwise unavoidable and which is qualitatively different than effects of coverage by other media."

Thus, for example, it has been argued in highly publicized cases that "film or electronic media coverage" may render it impossible to empanel a jury. Employing the suggested standard, the question would be whether the perceived prejudice would uniquely be the result of "film or electronic media coverage," as opposed to other forms of publicity. Stated differently, would the perceived evil be avoided if only "film and electronic media coverage" were prohibited?

The standard suggested by the MAB and WDIV is essentially that adopted by the Florida Supreme Court in *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764 (Fla., 1979), and as further refined in *State v. Palm Beach Newspapers, Inc.*, 395 So.2d 544 (Fla., 1981). Florida was the first state to permit courtroom cameras and the standard promulgated by its Supreme Court has withstood the test of time. This test, while resembling the "good cause/MCR 8.116(D) test," is clearer, more focused and easily applied.[2]

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[1] In the proposed language of §2(b) the "good cause" standard is referred to twice, in §2(b)(i) and again in §2(b)(ii). In the first instance the reference is to "good cause as determined under MCR 8.116(D)." In the second instance, there is no reference to the court rule. §2(a) and §2(b) would be stylistically consistent if the reference to "good cause" or any other standard in 2(b)(i) were eliminated and the standard addressed only in 2(b)(ii).

[2] Regardless of the standard which is chosen, the same standard should apply in all courts.

II. The Amended Administrative Order should clarify the procedure to be employed in deciding "film and electronic media coverage" issues.

In the proposed §2(b), the application of relevant standard is addressed twice, in §2(b)(i) and again in §2(b)(ii). In the first instance, it appears that the "good cause" determination is to be evidenced by an "order [which] ... state[s] with particularity the reasons for a denial." In the second instance, the "good cause" determination is evidenced by "a finding, made and articulated on the record."

To avoid confusion, the different approaches should be reconciled and the result addressed only in §2(b)(ii). In addition, §2(a) should be itself be amended so that essentially the same procedural approach is employed in both the trial and appellate courts. In the process, a deficiency in the original language can also be corrected. The original requirement of "a finding, made and articulated on the record" clearly contemplates – but does not expressly require – that a hearing preceded the finding. That omission should be corrected.

MAB and WDIV suggest that the following language be used in both §2(a)(ii) and §2(b)(ii):

> A judge may terminate, suspend, limit or exclude film or an electronic media coverage at any time after a hearing and upon a finding, made and articulated on the record that [applicable standard]. The finding should be set forth with particularity in an order.

III. Appeal rights should be clarified.

In the trial courts a decision regarding "film or electronic media coverage" is "not appealable, by right or by leave." In the appellate courts under the proposed amendment an appeal may be taken by right to the Chief Judge of the Court of Appeals, and a further appeal may be taken by leave to the Supreme Court.[3]

While from its inception AO 1989-1 has prohibited review by an appeal, trial court decisions concerning "film and electronic media coverage" have been the subject of superintending control. See, for example: *Detroit Free Press v. Third-Sixth District Judge*, 24 Med. L. Rptr. 1886 (Mich. Ct. App., 1996).

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[3]MAB and WDIV are not familiar with the procedure employed in the Court of Appeals and the Supreme Court to decide requests for "film and electronic media coverage." The references to "a judge" in §§2(b)(i)-(iii) indicate that such matters are referred to a single judge or justice. If that be the case, symmetry suggests that in the Supreme Court a decision by a single Justice adverse to "film and electronic media coverage" should be appealable to the Chief Justice.

The proposed amendment reflects the correct conclusion that there is benefit of some form of review. That conclusion applies equally in the trial courts. §2(a)(iv) should be amended to provide that orders concerning "film and electronic media coverage" are subject to superintending control.

IV. Additional Considerations.

The scope of AO 1989-1 is technologically dated, given the increasing use by the media of portable communication devices. The use of these devices has been the subject of a number of recent judicial decisions. A model policy regarding the use of such devices is attached.

MLRC Media Law Resource Center

COMMITTEE REPORT

MODEL POLICY ON ACCESS AND USE OF ELECTRONIC PORTABLE DEVICES IN COURTHOUSES AND COURTROOMS

Prepared by the Newsgathering Committee
Defense Counsel Section. Media Law Resource Center

MLRC NEWSGATHERING COMMITTEE: MODEL POLICY ON ACCESS AND USE OF ELECTRONIC PORTABLE DEVICES IN COURTHOUSES AND COURTROOMS

Introduction

Electronic devices including personal digital assistants, smart phones (with or without audio and/or video recording capability), Blackberry-brand and other similar hand-held text messaging devices, pocket PCs, and laptop computers have increasingly become a necessary tool for people entering the courthouse and participating in various judicial proceedings therein. Reliance on such devices has become the norm for many attorneys of record (*i.e.*, to schedule hearings and other professional commitments), witnesses, jurors, consultants, and members of the press.

The proliferation and nearly ubiquitous use of such devices raises various concerns within the courthouse, including issues related to security, decorum and solemnity of judicial proceedings, and harassment/intimidation of witnesses and jurors. In order to properly balance the competing interests of the public, the press, attorneys of record, judges, jurors, witnesses, and members of the public entering the courthouse and its courtrooms, this policy, adopted this _____ day of _____, 2010, shall govern the accessibility and use of such devices within the courthouse and within individual courtrooms.

This Court recognizes the expanding wireless communications infrastructures have become integral technologies the media and the public it serves depend upon and that their use enhances the quality and timeliness of reporting on judicial matters. For these reasons, a presumption of use of such technology by the press is desirable and

should be the norm.[1] Even if the court is willing to impose limited restrictions on use of such technology by members of the public within the court house, some accommodation must be made for members of the press to make use of laptops, cell phones, and other wireless devices in performing their function as news gatherers when appropriate.[2]

The following policies are the standard operating protocols and are subject, in all cases, to a judge or other judicial authority within this courthouse issuing additional specific orders or guidelines for the use of electronic devices in his or her courtroom:[3]

I. Policy Regarding Access of Electronic Devices to the Courthouse

(1) All persons granted entrance to the courthouse are permitted to possess and use pagers, laptop/notebooks/personal computers, handheld PCs (Personal Digital Assistants, such as Palm Pilots and Pocket PCs, with or without video or audio recording capabilities), digital or tape audio recorders, wireless devices (such as Blackberries), cellular telephones (including cellular telephones with cameras and videostreaming capabilities), electronic calendars, and/or any other electronic device that can broadcast, record, or take photographs (hereinafter "electronic device") while inside the courthouse.[4]

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[1] United States Court of Appeals for the Ninth Circuit, Electronic Devices Policy (Feb. 25, 2010) (recognizing that " a broad ban on such devices is not desirable and may not be feasible."). Copies of each of the court policies cited herein are on file at the Media Law Resources Center, and are available at http://www.medialaw.org/Content/NavigationMenu/Publications1/Articles_and_Reports1/Archive_by_Date1/Articles_and_Reports_Archive_by_Date.htm.

[2] *Considerations in Establishing a Court Policy Regarding the Use of Wireless Communication Devices*, Administrative Office of the U.S. Courts, C(2)(g); *see also* In the Matter of Personal Electronic Devices, General Order M-400 (S.D.N.Y. Bankr. May 19, 2010); In the Matter of Courthouse Security and Safety Measures, Judgment Entry of Jan. 22, 2010 (Erie Cty. Ct. of Common Pleas, Ohio); In the Matter of Courthouse Security and Safety Measures, Mem. Order of Jun. 22, 2009 (Licking Cty. Ct. of Common Pleas, Ohio).

[3] Electronic Devices in Supreme and Appellate Courts, The Use and Possession of Electronic Devices in Superior Court Facilities (Connecticut).

[4] Combination of: the United States District Court, Eastern District of Missouri General Order on Electronic Device Policy; the Electronic Devices in Supreme and Appellate Courts, The Use and Possession of Electronic Devices in Superior Court Facilities (Connecticut); the District Court of Maryland

(2) Persons possessing an electronic device may use that device while in common areas of the courthouse, such as lobbies and corridors subject to further restrictions on the time, place, and manner of such use that are appropriate to maintain safety (pedestrian traffic, ingress and egress), decorum, and order.[5]

II. Policy Regarding Access of Electronic Devices to the Courtroom

(3) Inside courtrooms, persons may use an electronic device to silently take notes and/or transmit and receive data communications in the form of text, only,[6] without need for obtaining prior authorization from the presiding judge or judicial officer.

(4) A judge or other judicial officer may prohibit or further restrict use of electronic devices if they interfere with the administration of justice, pose any threat to safety or security, or compromise the integrity of the proceeding.[7]

(5) It should be anticipated that reporters, bloggers and other observers seated in the courtroom may use electronic devices to prepare and post online news accounts and commentary during the proceedings.[8] Absent any of the circumstances identified above in paragraph (4), such use is presumptively permitted.

5th District Sitting in Prince George's County, 7th Amended Policy Governing Portable Electronic Devices and Controlled Dangerous Substances; and the United States District Court for the Middle District of Pennsylvania Standing Order No. 05-3.

[5] United States District Court, Eastern District of Missouri General Order on Electronic Device Policy.

[6] Anyone wishing to employ the photographic or audio capabilities of such devices inside a courtroom should consult with and abide by the statute and/or court rule governing such uses. *See* [insert appropriate statute or court rule].

[7] United States Court of Appeals for the Ninth Circuit, Electronic Devices Policy (Feb. 25, 2010); *see also*, District Court of the United States for the Middle District of Alabama, Order on Photography, Broadcasting, Recording and Electronic Devices ("Laptop computers may be used in the courtroom.").

[8] United States Court of Appeals for the Ninth Circuit, Electronic Devices Policy (Feb. 25, 2010).